FILE COPY

Office-Supreme Court, U. S.
FILED
APR 22 1949
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 748

GEORGE F. ZIMMERMANN, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION OF GEORGE F. ZIMMERMANN FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

COLEMAN GAY,
Austin, Texas,
HENRY H. BROOKS,
Austin, Texas,
J. HUBERT LEE,
Austin, Texas,
Attorneys for Petitioner.

INDEX

THE PETITION

	Page
Opinion Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	3
Statement of the Case	5
Specifications of Error to be Urged	14
Reasons for Granting Writ	15
1. Conflict of Decision with Supreme Court	15
2. Failure to Allow Appellant his day in Court by deciding the case on a basis other than on which it was tried or presented to CCA	22
3. Necessity for settling the law as to meaning "False Pretenses" so as to require affirmative action and not be predictable on facts that might constitute a "constructive fraud"	27
Appendix	32

THE BRIEF

1. Argument and authorities of 1st reason for granting writ	34
2. Argument and authorities of 2nd reason for granting writ	42
3. Argument and authorities of 3rd reason for granting writ	43

AUTHORITIES

Cases:

	Page
Brooklyn Savings Bank v. O'Neal (N. Y.), 65 S. Ct. 895, 324 U. S. 697	29
Beck v. U. S., 33 F. (2d) 107	37
Beckman v. U. S., 96 F. (2d) 15	38
Benton v. State, 136 So. 428, 24 Ala. App. 441	41, 43
Biddle v. U. S., China, 156 F. 756, 84 C.C.A. 415	44
Chaplin v. U. S., 157 F. (2d) 697, 168 A.L.R. 828, Anno.	29, 45, 46
Cockran v. Halsey, 25 Minn. 52	46
Durlan v. U. S., 16 U. S. 306, 16 S. Ct. 608	15, 16, 34
Davis v. Masonic Pro. Assoc., 162 P. 516, 94 Wash. 406	48
Foshay v. U. S., 68 F. (2d) 216	21, 22
Frank v. Mangum, Ga., 35 S. Ct. 582, 237 U. S. 309	40
Gavin v. Armistead, 22 S. W. 431, 57 Ark. 574	46
Hibbard v. U. S., 172 F. 66, 18 Anno. Cas. 1044	15
Harrison v. U. S., 200 F. 662	46
James Mills Orch. Corp. v. Frank, —N. Y. S. 473, 137 Misc. 307	48
Kaufman v. U. S., 282 F. 784	21
Kessler v. Strecker, La., 59 S. Ct. 694, 307 U. S. 22	41
Lane v. U. S., 34 F. (2d) 413	37
La Tulle v. Schofield, 60 S. Ct. 313, 308 U. S. 415	43
McDonald v. Chem. Natl. Bank, 174 U. S. 610	49
McLendon v. U. S., 2 F. (2d) 660	36
McCorkle v. State, 278 S. W. 965, 175 Ark. 105	45
Miles v. Pike Mining Co., 102 N. W. 555, 124 Wis. 278	48
Nibelink v. U. S., 66 F. (2d) 178	3, 7
Paschen v. U. S., 70 F. (2d) 491	37
Pritchard v. Myers—Md.—197 Atl. 620, 116 A.L.R. 775	50
Pybus v. Grassi, 59 N. E. (2d) 289, 317 Mass. 716	48
State v. Easton, 23 S. Ct. 288, 188 U. S. 220	49
Stewart v. Wyoming Cattle Ranche Co., Neb., 9 S. Ct. 101, 128 U. S. 383	48
Stuntz v. U. S., 27 F. (2d) 575	4, 6
Stager v. U. S., 233 F. 510	37
Sibbach v. Wilson & Sons, Ill., 61 S. Ct. 422, 312 U. S. 1	41

Stumpff v. People, 117 P. 135, 51 Colo. 202 45
Sankey v. McElevey, 104 Pa. 265, 49 Am. R. 376 48
Thomas v. U. S., 57 F. (2d) 1039 37
Union Pacific Coal Co. v. U. S., 173 F. 737 34
U. S. v. Dellaro, 99 F. (2d) 781 35
U. S. v. Corling, 44 F. Supp. 940 36
Webb v. Gregory, 108 S. W. 467, 49 Tex. Civ. App. 282 40
Young v. U. S., 48 F. (2d) 27 35

Statutes and Texts:

Sec. 215 Criminal Code (118 U.S.C.A. 388) 2
Sec. 1254 New Title 28 2
Secs. 3771 and 3772 New Title 18 2
Federal Rules of Criminal Pro. 37 and 39 2
Supreme Court Rule 38 ..... 2, 29
Vernon's Civil Statutes of Texas, Art. 5526 19
41 Am. Jur. 782 15
16 C. J. S. 1191 40
35 C. J. S. 642 44
35 C. J. S. 637 44
35 C. J. S. 655 45
35 C. J. S. 644 45
36 C. J. S. 119 41
37 C. J. S. 233 47
37 C. J. S. 249 48

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. .....

GEORGE F. ZIMMERMANN, *Petitioner*,

VS.

UNITED STATES OF AMERICA, *Respondent*

PETITION OF GEORGE F. ZIMMERMANN FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT ENTERED ON THE 18TH DAY OF JANUARY, 1949, BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AFFIRMING A SENTENCE OF CONVICTION ENTERED ON THE 9TH DAY OF FEBRUARY, 1948, BY THE DISTRICT COURT OF THE UNITED STATES FOR THE AUSTIN DIVISION OF THE WESTERN DISTRICT OF TEXAS, UNDER SEVEN COUNTS OF AN INDICTMENT CONTAINING NINE COUNTS

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, George F. Zimmermann, respectfully petitions this Honorable Court for a Writ of

Certiorari to the Circuit Court of Appeals for the Fifth Circuit, and in this connection would show the following:

I. OPINION BELOW

There was no opinion in this case by the United States District Court for the Austin Division for the Western District of Texas. The opinion dated the 18th day of January, 1949, by the United States Circuit Court of Appeals for the Fifth Circuit has not been reported but is contained in the record, Page 371.

II. JURISDICTION

The jurisdiction of this Court to issue a Writ of Certiorari to review the judgment of the 18th day of January, 1949, by the Circuit Court of Appeals for the Fifth Circuit is invoked under Section 1254 of New Title 28 (formerly judicial code Section 240 and 28 U. S. C. A. 347). See also Section 3771 and 3772 of New Title 18, effective September 1, 1948, and Federal Rules of Criminal Procedure 37 (b) (1) and (2), and 39; also Supreme Court Rule 38.

III. FEDERAL STATUTE INVOLVED

The Federal Statute involved is Section 215 of the Criminal Code (18 U. S. C. A. 338):

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

IV. QUESTIONS PRESENTED

1. Whether the constitutional and statutory rights of petitioner are not infringed by a conviction under Sec. 215 of the Criminal Code (Now Section 2145 of Title 18), Title 18 U. S. C. A. 338, of using or causing the mails to be used to defraud, when the evidence shows not only a lack of intent to defraud —but a conduct on the part of petitioner directed towards saving the creditors, customers and would-be customers of Brown Bros., (a legitimate firm that became insolvent about 1938 and of which petitioner was junior partner) from loss of money.

2. Whether the constitutional rights of the petitioner under the Fifth Article in the Bill of Rights

to the Constitution of the United States are not infringed when all the evidence of fraud by the petitioner, being uncontradicted, was more consistent with his innocence than with guilt.

3. Whether the Circuit Court of Appeals, for the Fifth Circuit, correctly held that a "false pretense" under Title 18, Sec. 338 of U. S. C. A. includes the following:

"Even if no *positive misrepresentations* and *promises* were made as charged in the indictment, still the continuance of the business, the payment of interest, the sending out of statements as before," (When the company was solvent) without disclosing to the addressees the "insolvency of the firm,"

"constituted a false pretense—that the firm's affairs were as they had been in the past."

Notwithstanding that all actions of the petitioner show him actively trying to safeguard the interest of the creditors of Brown Bros. (a general partnership between petitioner and R. L. Slaughter), and refusing, after insolvency, to accept loans from would-be lenders even to the extent of suggesting other investments; the "statements" mentioned being accurate statements of the amounts loaned by the addressees to the firm, the interest earned and balance owing to the addressees—usually enclosing a check for the interest. These being the same type of statements used by this firm for most of its *58 years of existence.*

Although we recognize that ordinarily this Court will not review questions of evidence, the petitioner's innocence is so plainly consistent with the uncontra-

dicted proof as to call for review—particularly in view of the fact that the Circuit Court of Appeals for the Fifth Circuit has given to the phrase "false pretense," in 18 U.S.C.A. 338, a meaning heretofore never given it by the Supreme Court, to-wit: A failure to inform creditors that defendant's company (a general partnership) had become insolvent; it being admitted that the company and its members had conducted a legitimate business for many years.

At the outset it must be pointed out that there is no conflict in the evidence and that in this respect the question is purely one of law, as to its sufficiency to support a finding of "guilty" under the Constitution and the statutes, and that there is no evidence of insolvency or of the financial worth of the senior partner, except his statement that he could "go North and East and raise $250,000.00."

V. STATEMENT OF THE CASE

Petitioner is the surviving member of Brown Bros., a *general and unlimited partnership* composed of petitioner, who was the junior partner, and R. L. Slaughter. The latter died on March 18, 1944, and petitioner was indicted on the 16th day of December, 1946, for using the mails to defraud (Criminal Code, Section 215, U.S.C.A., Title 18, Section 338). The indictment is in nine counts, each alleging the same scheme, but the mailing of five different statements of account, and two other letters by R. L. Slaughter, was the basis of each count. The government dismissed the counts 2 and 9, and the case was then tried before the District Court of the Austin Division of

the Western District of Texas, petitioner pleading not guilty and a jury having been waived. The Court found petitioner guilty on all remaining seven counts, and imposed a sentence of two years and $1,000.00 committed fine, on each count; the imprisonment sentences to run concurrently.

The cause was appealed to the Circuit Court of Appeals for the Fifth Circuit wherein the judgment of the district court was affirmed and an opinion rendered, both on the 18th day of January 1949; whereupon a motion for rehearing was filed on the 8th day of February, 1949, and was by said Court overruled on the 21st day of February, 1949. This Honorable Court allowed an extension of time to April 22, 1949, in which petitioner should file his petition for Writ of Certiorari to the Circuit Court of Appeals.

The following is a summary of the facts proved at the trial by uncontradicted evidence:

Brown Bros. was a legitimate and long established partnership composed of R. L. Slaughter (now deceased), and George F. Zimmermann, petitioner.

The business of Brown Bros. was primarily the collection of payments due on real estate mortgage-secured notes which, during the last few years of the firm's existence, varied from one to two millions of dollars per year; though prior to that time it was substantially more. For this service Brown Bros. charged 1% per annum of the principal, payable out of the collections.

Brown Bros. would also itself make loans on real estate mortgage-secured notes and sell these notes to

investors, but retain the collection thereof at 1%, as stated.

To partially finance itself in the purchase of such notes, Brown Bros. for many years prior to 1938 followed a course of accepting loans from open-account lenders who placed their money at interest with Brown Bros., at 5 or 6% per annum, subject to withdrawal on demand. *In some cases* the money placed with Brown Bros. was with the express understanding that when Brown Bros. had a mortgage-secured note available in an amount desired by the particular lender, it would be offered to him. Many notes of this type were sold by Brown Bros. to open-account lenders, Brown Bros. continuing to make the collections for the investor.

Brown Bros. being an unlimited partnership, was, as to creditors, as financially sound as the combined financial ability of the two members of the firm and the firm's assets.

The Government made no showing that the personal estates of petitioner or of R. L. Slaughter were not, at any time prior to the firm's bankruptcy, incapable of paying the obligations of the firm .

There is no evidence at all of the inability of R. L. Slaughter to pay all losses himself prior to his death on March 18, 1944. The only evidence as to his financial ability is his statement to petitioner that he could go North and East at any time and raise $250,000.00. (Record, Page 318.) There is no evidence showing the condition of the estate of R. L. Slaughter at the time of his death—*nor that it ever became insolvent.*

However, the firm did begin to lose money. Petitioner testified that he considered the firm insolvent

in 1939. (Record, Page 319.) He, personally, was not shown to be insolvent at any time prior to bankruptcy. Upon bankruptcy it appears petitioner's total liability to Brown Bros. was $49,093.60. (Record, Page 296.) *This included his share of the losses of Brown Bros. as well as his withdrawals.* His personal creditors were all paid off—his only unpaid liability was to Brown Bros., and of this $49,093.60, $37,857.83 represented his withdrawals since 1936 to bankruptcy. (Record, Page 57.) BUT, he paid in to the firm and the trustee over $40,000.00 (Record, Pages 204, 296, 301, 304 and 359), in cash and credits. In other words, petitioner was not only putting in his time free of charge to Brown Bros. since 1936, but upon bankruptcy paid in *more* money and property than what he had withdrawn; thus showing that *he did not draw on Brown Bros. beyond his power to repay*, and that during all the time of alleged insolvency he was depositing his personal funds in the firm's bank account.

The firm's deficit increased every year after 1938. In March, 1944, R. L. Slaughter died and shortly thereafter petitioner called the creditors together and later at the instance of some creditors filed an involuntary petition in bankruptcy: personally as well as of the firm. At the time of bankruptcy the deficit of the company was $134,687.44. The amount owing to open account creditors was $261,732.44.

The amount of the deficit was, with small variation, the same as the amount of interest at 6% that would have accrued to the unsecured creditors from 1936 to 1944, *so that the deficiency in the firm was in reality due to inability to earn enough to pay*

the interest, notwithstanding the firm's keeping its doors open to continue its business of servicing mortgages. Had the mortgage servicing accounts increased at any time to a reasonable extent, Brown Bros. would have been in a position to reduce and probably eliminate its deficit, but, contrary to the hopes, expectations and efforts of the members of the firm, this did not happen. (Record, Page 281.)

At the close of the business in 1944, there were 73 open-account investors. Of these, five were produced by the Government as witnesses at the trial. Their testimony was *that their dealings had been exclusively with R. L. Slaughter* and in some instances that Mr. Slaughter had assured them in conversations had *after 1938* that their investments on open account were safe, and *he* (and not Zimmermann) accetped their investments after insolvency. (Record, Page 76.)

The Government had available to it *all* the books, records and correspondence of Brown Bros. as well as the 73 unsecured creditors. *Yet at the trial not one witness nor one letter or record was produced to show petitioner had accepted money on open account after insolvency,* nor that he had stated orally or in writing that the firm was solvent or that unsecured credits with it were safe, nor that he in any way invited unsecured loans in the firm.

There was no evidence produced by the Government to show that the amounts of the unsecured loans placed in Brown Bros. prior to insolvency were different than the amounts thereof at the time of bankruptcy. It does not appear (with the exception of the moneys accepted by R. L. Slaughter during

insolvency from the five witnesses) that there was any other money accepted on unsecured open-account during insolvency. The Government started to introduce its Exhibit No. 2 at the trial, to show the balance in December, 1940, and in December, 1943, but did not. (Record, Page 60.)

The transactions and statements between R. L. Slaughter and these five witnesses—including their open account loans made after Brown Bros. was insolvent—plus the inability of the firm to earn enough to pay the interest due to its unsecured creditors from 1938 to 1944 and the failure of Zimmermann to compel a liquidation of the firm, is the basis for the Circuit Court's holding that Brown Bros. was in its entirety a fraudulent business, so that Zimmermann, by being a partner of the firm was by that very fact, a conscious promoter of all fraudulent acts—if any—of R. L. Slaughter.

Throughout most of the existence of the firm, it was customary for one of the clerks to send out semi-annual accounts to the unsecured creditors of Brown Bros. showing their previous balance, interest earned, payments made to them or additional loans made by them, and the new balance to their credit. There was nothing in the statements regarding the financial status of Brown Bros. or its partners.

Five of these statements sent out by the clerks were the basis of conviction of petitioner on five counts; the other two letters subject of his other two convictions were written by R. L. Slaughter: One of them, to Mrs. Horne (7th count) acknowledged receipt of $500.00 to add to her open account and prom-

ising to look for a secured loan for her; the other (8th count), is to Mrs. Callaway and relates to Mrs. Callaway's secured note having been paid off and a new mortgage-secured note by another borrower having been set aside to her.

During insolvency:

(a) Petitioner suggested liquidation to R. L. Slaughter who, being the senior and *policy determining member* of the firm, overrode petitioner, stating that he could go East and raise $250,000.00 any time. (Record, Page 318.)

(b) Petitioner never accepted any money on open account after insolvency, but did service the collections of the mortgage-secured notes.

(c) Petitioner had deposited in Brown Bros. bank account all his personal income, and at time of bankruptcy small amounts belonging to his wife and children were invested in the company on open account.

(d) Petitioner paid the remainder of his withdrawals and part of his share of the deficit when the firm took bankruptcy, showing that in his withdrawals from the firm he had kept within the limits of his ability to pay.

(e) Petitioner gave his time freely to operating the firm and servicing the income earning mortgage-secured investments, for which he received no compensation, notwithstanding that he could have earned more for himself outside the business by dedicating himself to an outside occupation.

(f) Petitioner at times not only refused to accept investments on open account but in fact even sug-

gested other investments to the prospective investor. (Record, Pages 279-280, 284, 289-290.)

It is also noteworthy that many persons of good standing in Austin, Texas, the home of petitioner, testified as to his good reputation, to-wit: A. C. Bull, Vice President of the American National Bank; T. H. Davis, Vice President of the Austin National Bank since 1920; Morris Hirshfeld, Vice President of the Austin National Bank for the last 25 years; George S. Shelley, former president of the State Bar of Texas. (Mr. Shelley's presidency of the State Bar does not appear of record, but we assume this fact will not be challenged by the Government.)

The Circuit Court of Appeals used the following language in its opinion:

"Zimmermann did not himself thereafter receive any deposits, which again is creditable, but he acquiesced in Slaughter's doing so, and must as the office man have known of each such deposit. Whether or not he knew of the exact things that Slaughter was doing and saying, he knew that the deposits were being made on the faith of the reputation and past record of the firm, and as office man he did his part in booking them and sending out the semi-annual statements and paying the interest, which were all necessary to keep things going and to prevent 'a run on the bank.' Moreover, he as a partner shared in the benefit of every such act of Slaughter's and was actually drawing out of the firm's money, which included these deposits, his own living all the while. The conclusion is warranted that he was consciously aiding and abetting what Slaughter was actively doing. They were both knowingly deceiving their deposit customers. Even if no positive misrepresentations and promises were made as charged in the in-

dictment, still the continuance of the business, the payment of interest, the sending out of statements as before, with concealment of the known insolvency, constituted a false pretense, also charged in the indictment, that the firm's affairs were as they had been in the past."

There is no testimony or office routine in evidence showing any state of facts from which it could be presumed that petitioner "must have known of each such deposit"—reference being to unsecured open account loans accepted by R. L. Slaughter.

The undisputed testimony of petitioner is that he did not know R. L. Slaughter was accepting new unsecured accounts after 1940 (Record, Pages 348, 349) and that while he made up the annual reports *he made them from totals of the various accounts.* (Record, Page 343.) The firm's bookkeeper was the only one who could see the entries made from day to day. There is no evidence that the difference in totals of accounts was so different from previous years as would warrant an assumption that it drew petitioner's attention to it.

Petitioner testified (Record, Pages 348, 349) that he knew Mr. Slaughter was making mortgage-secured loans. The reasonable construction is that for this purpose he could accept money from investors.

While petitioner was drawing from the firm, he actually was putting into the firm and leaving available to its creditors as much as he was taking out, and after bankruptcy had put more in than he had taken out all together.

VI. SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in:

1. Failing either to sustain or to overrule appellant's Second Point of Error to the effect that there was a fatal variance between the indictment charging a general scheme to defraud customers of Brown Bros. and the proof showing at most a few unrelated and isolated instances.

2. Holding that the evidence was sufficient to show that appellant was a conscious participant in the alleged scheme to defraud.

3. Holding that there was an allegation and proof that appellant and R. L. Slaughter made a false pretense "that the firm's affairs were as they had been in the past."

4. Failing either to sustain or to overrule the contention in appellant's Eighth Point of Error to the effect that he should have been acquitted on all counts because the evidence taken as a whole is at least as consistent with his innocence as with his guilt.

5. Assuming without discussion that proof of the scheme to defraud sufficiently proved that the use of the mails was with intent to further the scheme.

6. Failing either to sustain or to overrule the contention that the alleged scheme to defraud had been completed before the indictment letters were mailed.

7. Holding that testimony as to statements made by R. L. Slaughter were admissible in evidence

against appellant since there was no evidence that they acted in concert or that they had devised a scheme to defraud.

VII. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. *The Circuit Court of Appeals has decided this case in a manner probably in conflict with applicable decisions of the Supreme Court of the United States of America.*

Durland v. U. S., 16 U. S. 306, 16 S. Ct. 608;
Hibbard v. U. S., 172 F. 66, reported and annotated in 18 Anno. Cas. 1044;
41 *Am. Jur.* 782.

This Court held in the above case of Durland v. U. S., that a fradulent intent was necessarily an element of the crime of using the mails to defraud. (Crim. Code, Sec. 216.)

In the present case there is no conflict in the evidence, and it is submitted that as a matter of law as well as of fact, there is a total absence of proof of actual fradulent intent on the part of petitioner to support a finding of guilty.

Assuming there are grounds for finding that petitioner is guilty of a *constructive* fraud, which is characterized by the lack of fradulent intent, such *constructive* fraud has not insofar as we are able to determine, been held by this Court to entail such intent as is contemplated by the mail fraud statute.

To allow the opinion of the Circuit Court of Appeals in this case to stand, would in effect establish a precedent—contrary to *Durland v. U. S.*—to the effect that facts which might support a finding of *constructive fraud* are a sufficient basis for conviction under the mail fraud statute.

The facts set out *in the opinion itself*, while not all the acts proved negativing criminal intent, on their face show that petitioner at no time made any false or fradulent representations or promises, but on the contrary at all times acted under his best judgment—*as of that time*—to the end of protecting the creditors and would-be creditors of Brown Bros.

The following quotations from the opinion of the Circuit Court of Appeals will show beyond a doubt that Mr. Zimmermann, the petitioner, was a man of good conscience and had no fraudulent or criminal intent in his participation in the partnership known as "Brown Bros."

"The firm had a fine reputation."

"This business was all done legitimately and honestly until in the 1930's. . . ."

"The original partners had been bought out by Slaughter about 1915, when he took in as a partner Zimmermann, who had been a bookkeeper for some time. Zimmermann was also a lawyer and rendered service about the titles."

"Zimmermann testified that in 1938 he realized the firm was insolvent and pressed Slaughter to do something about it, even proposing that it be liquidated and dissolved,"

"Slaughter owed the firm over $171,000.00 and Zimmermann over $49,000.00. Zimmermann's es-

tate in Bankruptcy repaid the greater part of this account."

"There were 73 depositors including three small accounts of Zimmermann's wife and children."

"Slaughter did the receiving of money in the last years, and encouraged some to deposit right up to the time of his death. Zimmermann did not receive any deposits after 1939, and even suggested other use of their money to would-be depositors, but did not tell them of the firm's condition."

"Zimmermann drew about $10,000.00 for an oil well venture, but he paid in about $7,000.00 earned on the outside as a lawyer during the last six years."

"We believe the business was fair and honest and its good reputation deserved prior to 1938, the situation changed then."

"But things got worse and worse so that Zimmermann no longer had hopes and proposed liquidation. This is to his credit, but instead of insisting as he had the right to have done he acquisced in Slaughter's determination to continue. *Zimmermann did not himself thereafter receive any deposits, which again is creditable, but he acquiesced in Slaughter's doing so.*"

"Whether or not he knew of the exact things that Slaughter was doing and saying, he knew that the deposits were being made on the faith of the reputation and past record of the firm, and as office man he did his part in booking them and sending out the semi-annual statements and paying the interest."

In addition to the foregoing there were many other circumstances proved at the trial without refutation which bolster Mr. Zimmerman's moral motives and negative his even being capable of a fradulent intent. e. g.

Petitioner has at all times lived an honorable life,

and was 67 years old at the time of the trial. (Record, Page 307.)

Miss Edna Palm who testified she had known Mr. Zimmermann for about 40 years stated on the witness stand the following:

Q. Now, are you familiar with Mr. Zimmermann's reputation in the community in which he lives for honesty and integrity and fair dealing in financial matters?
A. I certainly am.
Q. Is that reputation good or bad?
A. From all of my friends, and all I know of him, that is what I would consider him.
Q. You consider it good?
A. I certainly do.
Q. Have you consulted Mr. Zimmermann for advice about making investments since Brown Bros. went into bankruptcy?
A. I have.
Q. During all of the years that you worked along with Mr. Zimmermann at Brown Bros., did you ever observe or hear anything to indicate to you that Mr. Zimmermann was dishonest?
A. If Mr. What?
Q. Did you ever see or observe or hear anything during all of the years that you worked up there for Brown Bros. to indicate to you that Mr. Zimmermann was dishonest?
A. No, never.

The financial statements prepared by petitioner were accurate and not fraudulent, and showed the true condition of the business. Nowhere in the evidence does it appear that petitioner ever presented a false financial statement to any one nor that he

ever told anyone that Brown Bros. was solvent. Yet there were 73 open account customers of Brown Bros. on whom the government could have called if petitioner had made such statements.

Miss Roberts, an employee of the firm for 15 years never knew of petitioner's writing a single letter to induce any one to leave money in open account at interest with Brown Bros. (Record, Page 145.)

The proceeds of the sale of petitioner's former home were paid voluntarily by petitioner into the firm's bank account and passed to the trustee in bankruptcy of Brown Bros. (Record, Page 294.)

Petitioner, being a lawyer, knew that mailing out the semi-annual statements showing and acknowledging the balance of indebtedness to the customers of Brown Bros. tolled the two year statute of limitation and testified that was one of the purposes.

Vernon's Civil Statutes of Texas, Article 5526:

"There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following descriptions:

1. * *
2. * *
3. * *
4. Actions for debt where the indebtedness is not evidenced by a contract in writing."

Had he an intent to defraud he would have scrupulously avoided sending such semi-annual statements. In this manner many of the claims of

creditors of Brown Bros. could have been rendered unenforceable, and perhaps bankruptcy would have been avoided.

Obviously the mailing of the semi-annual statements was as testified to by Mr. Zimmermann to make record of the account to date of issue showing interest, payments, etc., and an acknowledgement of a debt, to protect the creditors to that extent. This, and none other, was the purpose of these letters. *There is no evidence of any change of intent (motive) after insolvency.* Mr. Zimmermann should not be deprived of his good reputation and liberty on mere surmises, conjectures or suspicion.

The business of Brown Bros. included as the principal part of its business the servicing and collecting of mortgages for many corporate and other investors other than those 73 who were open account creditors. On the basis of a commission to Brown Bros., of 1% on the principal per annum payable out of the interest, the statement for 1936 (Record, Page 130 et seq) indicates outstanding loans being serviced in the approximate amount of $1,320,702; in 1937—$1,168,580; in 1938—$1,211,382; in 1939—$1,098,498; in 1940—$1,179,747; in 1941—$1,079,011; in 1942—$1,048,983.

It is therefore apparent that the principal business of Brown Bros. involved the handling of large sums of money and that these were handled honestly. There was no loss suffered on these moneys by the owners of the notes being serviced by Brown Bros., *and the government does not claim there was such a loss.*

It is respectfully submitted that the actions of petitioner together with his reputation as an honest man, unquestionably support his absolute freedom from a fradulent intent; that the holding of the Circuit Court of Appeals is in direct conflict with Durland v. U. S., supra, in that at most, the facts of this case may (even as stated in the opinion of the Circuit Court) support a finding of lack of judgment on the part of petitioner, but negative a criminal intent.

The foregoing facts should be reviewed through the principle that a defendant may not be convicted except by evidence showing him guilty beyond a reasonable doubt; and also through consideration of the good reputation of defendant as testified to by the exceptionally good class of men who speak so well of petitioner. In this connection the following excerpt from *Kaufman v. U. S.*, 282 F. 784 is apropos:

"Good reputation is the result of right thinking as reflected in right living, in a course of honest dealing and honorable conduct. This is, and should be, an important factor to be considered in determining the guilt or innocence of a person accused of crime. Every defendant is entitled to have his reputation for good character placed upon the scales in his behalf. When considered in connection with the other evidence in a case, it may be sufficient to create a reasonable doubt." *Kaufman v. U. S.*, 282 F. 784.

The following excerpt from *Foshay v. U. S.*, 68 F. (2d) 216, is also applicable:

"Under our system of law men are not punished

for mere mistakes, mere mismanagement, mere carelessness, or mere error of judgment, but are punished only for intentional wrong doing." *Foshay v. U. S.*, 68 F. (2d) 216.

The Circuit Court of Appeals in effect held that R. L. Slaughter was defrauding the unsecured creditors of Brown Bros. by representing that their money was safe with the firm at the time the firm was insolvent and was accepting unsecured loans during the period of insolvency; however, in Texas a general partner in a firm is liable personally for the debts of the firm, and no evidence was introduced to show that R. L. Slaughter or his estate were unable to pay the debts nor that any demand therefor had been made of the estate of R. L. Slaughter.

The Circuit Court of Appeals also in effect held that the fact of partnership in a legitimate commercial concern imputes knowledge and criminal intent to one partner for the fraudulent acts that the other might commit in the business, purely on a presumption that a partner's duties place him in a position where he might be able to discover what the other partner is doing.

2. *In addition to the foregoing, it is respectfully submitted that the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision, in that in effect it has deprived this petitioner of his day in court by deciding the question before it on the basis of a question*

not presented or argued by either party before it, to-wit:

That "false pretenses" as used in the mail fraud statute, includes that class of cases wherein there is no false statement nor any affirmative representation made by the accused; that his inaction in failing to close down a legitimate business of nearly sixty years standing because it has become insolvent, is a fradulent pretense that "the firm's affairs were as they had been in the past," and that such set of facts warrant conviction under an indictment charging that intentional false pretenses and representations were made by the accused. The indictment charged that petitioner *made* intentional false pretenses and representations:

"That Brown Bros. was operating at sufficient profit to enable said company to pay interest on all money left by customers on deposit with said company; that money left by customers with Brown Bros. constituted a sound and safe investment; that Brown Bros. was solvent."

The entire case was tried in the trial court and argued and briefed in the Circuit Court of Appeals on the theory that affirmative statements having been made during the firm's insolvency by Mr. Slaughter, (deceased prior to indictment against Zimmermann) to 5 of the open-account creditors of Brown Bros. to the effect that their investments were safe with Brown Bros., such statements constituted the "false pretenses and representations" required

to bring the case within the mail fraud statute: The question being whether such statements could be the basis for ascribing false pretenses and fradulent intentions to petitioner, in view of the fact that admittedly they were made out of the presence and hearing of petitioners.

Petitioner's contention in this regard is well illustrated by the following excerpt from the record with respect to the testimony of Frank Jewett, one of the open-account investors (Record, Page 75):

Q. What was the nature of the business you had with that firm?

A. I invested money there. I invested money for first lien mortgage loans, and I told them they had to be good.

Q. Who did you tell that to?

A. R. L. Slaughter.

Q. When did you first start doing business with Brown Bros.?

A. Off and on from—well, probably thirty or forty—thirty years at least.

MR. GAY: At this time, may it please the court, I want to make an objection to any testimony relating to dealings with Mr. R. L. Slaughter, if it does tend to show that he committed any such offense, unless the government is able to show that the defendant Zimmermann was a conscious promoter of the crime under discussion. In other words, it is our position, and it will run throughout the testimony, that the mere fact of partnership does not make Mr. Zimmermann liable criminally for the act of a partner, and that in order for him to be bound by misdeeds of which Mr. Slaughter might be shown to be guilty, it would be necessary that Mr. Zimmermann was a conscious promoter of the same thing.

THE COURT: You mean by that he participated by agreement or otherwise?

MR. GAY: Yes Sir.

THE COURT: I assume that that objection is good, is it not?

MR. MOURSUND: Your Honor, if we prove a scheme to defraud here, then, of course, the acts of one would be the acts of all. Of course, if I cannot prove it, I expect the court to strike it out of the record.

THE COURT: The court will carry that objection along and see just what does happen.

MR. GAY: And for the sake of the record also, may the same objection extend to all transactions with Mr. Slaughter that may be testified to, or would you prefer that the objection be renewed each time?

THE COURT: No, I am willing to let that objection stand that way.

The major portion of the testimony of the government's witnesses who had open-account loans was as to conversations and dealing had with Mr. Slaughter out of hearing and presence of petitioner, and as against them the above objection was the pertinent question.

The Circuit Court of Appeals, however, minimized the importance of the basic theory on which this cause was tried in the trial court, and decided the case on the theory that although no affirmative misrepresentations and promises were made by petitioner as charged in the indictment, the failure of petitioner to compel Slaughter to close down the business or his failure to disclose the insolvency to the open account creditors was sufficient to constitute a

"false pretense" under the statute. In this regard the Circuit Court of Appeals stated in its opinion:

"The Court thought the objection probably good, but on the district attorney's promise to show a situation where the acts of one would be the acts of all, the Court ruled, 'I will carry the objection along and see just what happened.' No further ruling seems to have been made. We think, however, that the case as fully developed later would justify the consideration of the evidence, *if it was considered*, so that no error is shown."

* * * * * *

"*Even if no positive misrepresentations and promises were made as charged in the indictment, still the continuance of the business, the payment of interest, the sending out of statements as before, the concealment of the known insolvency, constituted a false pretense*, also charged in the indictment, that the firm's affairs were as they had been in the past."

The statement in the above quotation that the indictment charged, as a false pretense, "that the firm's affairs were as they had been in the past," is not strictly accurate. The portion of the indictment which is believed is the basis of the Circuit Court's statement is quoted in the second paragraph of this Item 2, on Page 23.

Confirmation that this cause was not presented or argued by either party before the Circuit Court of Appeals on the basis, above shown, on which that court decided the case, may be found in the list of errors assigned and briefed by petitioner in the Circuit Court of Appeals and by the answer of Govern-

ment's Counsel therein. This list is set out in Appendix A of this petition.

3. *The Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law which has not been but should be settled by this Court, to wit:*

It has construed the term "false pretense" as used in Section 215 of the criminal code as not requiring affirmative misrepresentations or promises; that inaction of the accused in failing to close down a legitimate business because it has become insolvent and his failure to disclose to the firm's unsecured creditors the insolvency of the business is a "false pretense" within the statute, rendering the entire business a fradulent scheme.

The business being for many years a reputable and legitimate concern, and principally a loan and collection business, (the use of borrowed funds being merely incidental) and the government showing there were loans to the firm for $261,000.00 on open account at the close of the firm—but not showing whether this amount had increased or decreased, nor to what extent, since 1938, nor how it compared to to the amount owed prior to insolvency; and the government showing R. L. Slaughter had received unsecured loans on open account after insolvency *from only 5 out of 73 open account investors*, and the government having all the books of Brown Bros, in its possession, failed to show that any portion of the $261,000.00 other than a portion of the loans made

by the 5 witnesses, was made during the insolvency, and the uncontradicted evidence showing Zimmermann did not accept unsecured open accounts after insolvency, it is apparent that there was no basis for considering the entire business fraudulent so that all members of the firm should be charged with an intent to defraud, *unless* the failure of the firm to disclose the insolvency of the firm to its open account creditors and the failure to liquidate the business, is sufficient to render the entire business a false pretense for the purposes of obtaining money; quite clearly this is the reason for the Circuit Court of Appeals making the following statement in its opinion:

"Even if no positive misrepresentations and promises were made as charged in the indictment, still the continuance of the business, the payment of interest, the sending out of statements as before, the concealment of the known insolvency, constituted a false pretense, also charged in the indictment, that the Firm's affairs were as they had been in the past."

Thus, the Circuit Court of Appeals has construed Sec. 215 of the Criminal Code to deny the use of the mails for purposes entirely legitimate to an insolvent concern who does not disclose its insolvency to its creditors, though it makes no false affirmative representation as to its solvency or otherwise, on the ground that sending out the semi-annual statements and paying the interest were all necessary to keep things going; notwithstanding one of the members of the firm is working diligently to help the earnings of the business and refuses to receive (let alone try "to obtain") money on unsecured loans.

In so holding it has interpreted the term "false pretense" to include *mere inaction* where there is no duty to act. In so far as counsel for petitioner has been able to ascertain, there is no decision by this Honorable Court settling the meaning of the term "false pretenses" under Sec. 215 of the Criminal Code with respect to whether mere inaction is sufficient to warrant conviction. It is respectfully and earnestly submitted that this Court should grant this petition for certiorari to the Circuit Court of Appeals in order to settle this important question of Federal Law and thereby place a definite limitation on the classes of cases falling within the term "false pretenses" as applied to Sec. 215 of the U. S. Criminal Code—now Sec. 1341 of Title 18 effective September 1, 1948.

U. S. Supreme Court Rule 38 paragraph 5 (b); Brooklyn Savings Bank v. O'Neil (NY 1945) 65 S. Ct. 895, 324 U. S. 697.

While it is admitted that a fraudulent *promise* to do something in the future may constitute one of the elements of the mail fraud statute by virtue of the very language of such statute, it is submitted that the meaning of "false pretenses" is to be found in the Common Law meaning thereof, and that in ascertaining criminal intent the following quotation from Chaplin v. U. S., by United States Court of Appeals, ...App. D. C....., 168 A. L. R. 828, 157 F. 2nd 697, is pertinent:

It is of course true that then, as now, the intention to commit certain crimes was ascertained by looking backward from the act and finding that the ac-

cused intended to do what he did do. However, where, as here, the act complained of—namely, failure to repay money or use it as specified at the time of borrowing—is as consonant with ordinary commercial default as with criminal conduct, the danger of applying this technique to prove the crime is quite apparent. Business affairs would be materially incumbered by the ever present threat that a debtor might be subjected to criminal penalties if the prosecutor and jury were of the view that at the time of borrwing he was mentally a cheat. The risk of prosecuting one who is guilty of nothing more than a failure or inability to pay his debts is a very real consideration. It is not enough to say that if innocent the accused would be found not guilty. The social stigma attaching to one accused of a crime as well as the burdens incident to the defense would, irrespective of the outcome, place a devastating weapon in the hands of a disgruntled or disappointed creditor.

It is respectfully submitted that such an interpretation of Sec. 215 of the Criminal Code, as is placed on it by the Circuit Court of Appeals, while in line with human nature in seeking retribution against a defaulting debtor, is such an enlargement of the original purpose of the statute as to open the doors to retrogression to the days of the debtor's prison.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No.

12275, George F. Zimmerman, Appellant v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the Court, and for such further relief as to this Court may seem proper.

COLEMAN GAY,
Austin, Texas,
HENRY H. BROOKS,
Austin, Texas,
J. HUBERT LEE,
Austin, Texas,
Attorneys for Petitioner.

..... April, 1949.

APPENDIX A

I. Appellant's Specification of 5rror on Appeal to the Circuit Court of Appeals:

1. The insufficiency of the evidence to show that defendant was a conscious participant in alleged scheme to defraud.

2. Variance between indictment, which charged general scheme to defraud customers of Brown Bros., and proof, which showed at most a few unrelated transactions.

3. The error in admitting testimony of statements made by defendant's partner R. L. Slaughter in the absence of evidence that they acted in concert.

4. The insufficiency of the evidence to show the making of material false representations in executing the alleged scheme.

5. The insufficiency of the evidence to show that Mr. Slaughter and defendant acting together devised a scheme to defraud.

6. The insufficiency of the evidence as to First and Third Counts since addressees of letters there described in no event could have been defrauded.

7. The insufficiency of the evidence to show that mails were used with intent to further alleged scheme to defraud.

8. Defendant should have been acquitted on all counts because evidence is at least as consistent with his innocence as with his guilt.

II. Appellee's Points for Affirmance:

1. The Circuit Court of Appeals will not consider the sufficiency of the evidence where the question is not raised in the trial court.
2. There was ample substantial evidence introduced by the Government to warrant the Court in finding the defendant guilty and further to sustain the judgment.
3. There was ample substantial evidence to sustain the Court's finding as to the guilt of the defendant on the first and third counts in the indictment.
4. The scheme was continuously in the course of operation before as well as after the mails were used.
5. The evidence taken as a whole is more consistent with the defendant's guilt than with his innocence.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. *The Circuit Court of Appeals has decided this case in a manner probably in conflict with Durland v. U. S., 16 U. S. 306, 16 S. Ct. 608, wherein this Honorable Court held that an actual intent to defraud was an essential element of the mail fraud statute.*

The facts as set out in the opinion itself negative the thought that petitioner devised a scheme to defraud or for obtaining money or property by false or fraudulent pretenses or representations; they also negative the possibility that petitioner made any false or fraudulent promises; and they admit five of the count letters were statements of the same nature as were always used by the firm, thus affirmatively establishing their innocent purpose. The other two letters were sent by R. L. Slaughter and are as consistent with an innocent purpose as with guilt. (Record, Pages 89, 169, 171, 187, 203, 223.)

As said by the Circuit Court of Appeals for the Eighth Circuit in *Union Pacific Coal Co. v. U. S.*, 173 Fed. 737:

"There was a legal presumption that each of the defendants was innocent until he was proved to be guilty. The burden was upon the Government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which excludes every other hypotheses but that of guilt, it is the duty of the trial court

to instruct the jury to return a verdict for the accused and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment of conviction."

The following excerpt from *Young v. U. S.*, 48 F. (2d) 27, is also pertinent:

"One cannot be held as a member of a conspiracy upon proof merely that he had knowledge of, or negatively acquiesced in, a crime that was about to be committed; but, in order to fasten guilt upon one accused of being a coconspirator, it is necessary to prove that he actively participated in the conspiracy charged."

Also the following from *U. S. v. Dellaro*, 99 F. (2d) 781 (2nd Circuit):

"Inaction is of course acquiescence, but acquiescense is passive, and to become a party to a crime one must affirmatively unite oneself with the venture, or, in the case of a conspiracy, must agree to take some part in it."

The record contains no evidence of any advertisement, letter, or other solicitation of funds from its customers or from members of the public, nor is there any other evidence of a general scheme or attempt to secure loans from any source. There is no evidence of the circulation of any false or alluring statement or of the giving of any financial statement. In these respects the case differs from all the cases wherein the courts have found a scheme to defraud in connection with an established legitimate business.

The undisputed evidence shows only that there were transactions between R. L. Slaughter and five out of 73 unsecured creditors during insolvency which might be considered representations, but a few unrelated transactions do not render an entire legitimate business a scheme to defraud.

In *McLendon v. U. S.*, 2 F. 2(d) 660, the Circuit Court of Appeals for the Sixth Circuit said in discussing the sufficiency of an indictment:

"McLendon was engaged in the breeding, buying, and selling of bird dogs. Like every other legitimate business, this gives the trader, if he is so inclined, opportunity to defraud one customer after another by misrepresenting the quality of his goods, or by the great variety of expedients occurring to an ingenious scoundrel; but it has never yet been though that the 'scheme to defraud' of Section 215 of the Criminal Code would be found in the mere succession of diverse swindles, unrelated save as they had a common stage. It is not set out in the indictment or claimed in the proofs that McLendon's business was not, in substantial part, legitimate and satisfactory to his customers; and so, if the indictment is to be held good, we must find it in an allegation of some general fraudulent scheme dominantly characterizing some part of his business."

Similarly, in *United States v. Corling*, 44 F. Supp. 940 (Dist. Ct., S. D. Calif.), it was contended by the Government that various salesmen in a land-selling scheme could each be guilty as to the transactions in which they engaged, and not be guilty as to the transactions in which they had no direct part. In refusing to accept this contention the Court said in part:

"* * * And a verdict which would find certain defendants guilty only as to certain transactions which they handled would, in itself, negate the existence of the scheme. For, if there be a fraudulent scheme to which the defendants were knowingly parties, each is liable for the acts of the others. [Citing authorities.] On the other hand, if each individual is guilty only in relation to the sales which he made, then we have not one scheme, but as many schemes as there are defendants. Individual representations, unrelated to each other, and not a part of a scheme to defraud, cannot be given the dignity of a scheme to defraud."

The Opinion of the Circuit Court of Appeals in the instant case may be construed as sustaining petitioner's position that the statements and conversations of R. L. Slaughter and the Government's witnesses in the absence of petitioner are not admissible against petitioner, unless the whole business was a scheme to defraud and petitioner was a conscious promoter. In this connection the following cases are applicable:

Paschen v. U. S., 70 F. (2d) 491 (C.C.A. 7);
Stager v. U. S., 233 Fed. 510;
Beck v. U. S., 33 F. (2d) 107 (C.C.A. 8);
Lane v. U. S., 34 F (2d) 413 (C.C.A. 8);
Thomas v. U. S., 57 F. (2d) 1039 (C.C.A. 8);
Nibelink v. U. S., 66 F. (2d) 178 (C.C.A. 6).

In view of the death, prior to the indictment, of R. L. Slaughter, the person charged to have made the statements and representations on which petitioner

was convicted, the following excerpt from 31 *C.J.S.* 1018 is pertinent:

"Exposed to all the infirmities mentioned in the preceding sections and to the further objection that it is impossible, in most instances, to convict the witness of perjury, if his testimony is wilfully false, *testimony as to the oral statements of deceased persons is therefore regarded as the weakest kind of evidence and subject to the closest scrutiny.*" (Emphasis supplied.)

This quotation from *Beckman v. U. S.*, 96 F. (2d) 15 is also in point:

"* * * It is true where guilt depends entirely upon circumstantial evidence, that the burden rests upon the government to prove its case not only beyond a reasonable doubt but to the exclusion of every reasonable hypothesis of innocence * * *."

The Circuit Court of Appeals does not sustain the indictment in the many charges therein as to the acts and representations claimed to be false, but it does contend that (1) the indictment charged, and (2) the proof showed, that petitioner made "false pretenses." "That the affairs of the firm were as they had been in the past."

Reference has already been made to this and to the discrepancy between this contention and the charge in the indictment that petitioner made false and fraudulent representations of solvency, and it is further discussed in Parts II and III of this brief.

We have read the record carefully and do not find such representation of solvency, and the Circuit

Court of Appeals confirms us in this position by finding it necessary to in fact rewrite the charge of a false representation of solvency and "interpret" the judgment of the trial court. The Circuit Court of Appeals has erroneously found an intent to defraud and the making of false pretenses in the following facts:

That the fact of general partnership and that 5 persons out of 73 open account creditors placed money on open account loans with R. L. Slaughter out of the presence of petitioner, during the period of insolvency of the firm, and failure to disclose the insolvency of the firm or to close it, was sufficient to constitute the firm as an entirety a fraudulent scheme so as to charge petitioner with knowledge of "the things Slaughter was doing and saying" (there being no evidence that Slaughter was doing or saying anything other than what he did and said with respect to the five unsecured investors); *notwithstanding uncontested proof that petitioner was rejecting open account loans from the time of such insolvency*, and the absence of any evidence that any of the remaining 68 open account creditors placed any of their funds in the firm during insolvency; and notwithstanding the testimony of the government's accountant that the losses of the firm were approximately equivalent to the interest earned by the creditors during insolvency on the principal invested prior to insolvency; and notwithstanding further that petitioner was putting his own money in the firm's account all the while and making available to the general creditors assets in greater amounts than he was drawing and that he was not paying

himself for his time and work; and notwithstanding the absence of any evidence as to the financial responsibility of R. L. Slaughter during the period of the firm's insolvency other than his statement that he could go North and East and raise $250,000.00.

It is earnestly submitted that *if the actions of one of two partners in accepting unsecured loans upon his assurances of the firm's soundness during insolvency is the basis for holding a firm to be a fraudulent scheme within Sec. 215 of the Criminal Code and to base a finding of fraudulent intent thereon against the other partner, and such firm is an unlimited general partnership, then it is essential to support such conclusion of "guilty" that both partners be shown to also be insolvent in their personal estate. Failure to show that one of them is insolvent is a plain and fundamental error requiring reversal, for the assets of the individual partners are liable for firm debts, and subject to attachment therefor.* 47 C.J. 979; *Webb. v. Gregory*, 108 S. W. 467, 49 Tex. Civ. App. 282.

In this connection we cite 16 *C.J.S.* 1191 which states as follows:

"Where an appeal is given, the proceedings in the appellate Court, as well as those in the trial court, must be considered in determining whether due process of law has been afforded or denied." n. 62.

n. 62—*Frank v. Mangum*, Ga., 35 S. Ct. 562, 237 U. S. 309, 59 L. Ed. 969. (Other cases too.)

"It would not be due process of law for an appellate court to supply a failure of proof or remedy the

cursory manner in which the case was tried below." Benton v. State, 136 So. 428, 24 Ala. App. 441. (Emphasis supplied.)

"The Supreme Court may notice a plain fundamental error even though not assigned as error in the Circuit Court of Appeals or in the Supreme Court." 36 *C.J.S.* 119.

Kessler v. Strecker, La., 59 S. Ct. 694, 307 U. S. 22, 83 L. Ed. 1082, modifying, C.C.A., *Strecker v. Kessler*, 95 F. (2d) 976, rehearing denied 96 F. (2d) 1020, certiorari granted *Kessler v. Strecker*, 59 S. Ct. 102, 305 U. S. 587, 83 L. Ed. 371;

Sibbach v. Wilson & Co., Ill., 61 S. Ct. 422, '12 U. S. 1, 85 L. Ed. 479, reversing 108 F. (2d) 415, certiorari granted 60 St. Ct. 809, 309 U. S. 650, 84 L. Ed. 1001.

The Circuit Court of Appeals in effect held that there was a constructive fraud by petitioner, and and that a constructive fraud was sufficient to convict under the statute, and that the fact of partnership in a legitimate commercial concern imputes knowledge and criminal intent to one partner for the fraudulent acts of the other in the business, purely on a *presumption* that a partner's duties place him in a position where he should know what the other partner is doing, and that appellant was properly convicted of an actual intent to defraud and of the use of the mails in execution of the fraud on the basis of said presumption and of the further presumption that the purpose in mailing the letters had changed with insolvency.

The effect of the letters may have been to lull into a feeling of security; but on the contrary, it is equally reasonable to believe the effect would be to direct attention to the size of the unsecured investment and cause uneasiness. Irrespective of the possible effect that may appear in retrospect, such effect must not be confused with *intent.* Many effects entirely unrelated to actual motive may arise from an innocent action. The reasonable conclusion is that petitioner was motivated by the same intent and purposes in continuing to allow the form letters to be mailed after insolvency by which he was actuated before insolvency. It certainly does not appear beyond a reasonable doubt that his motives changed with insolvency. The firm was conducting the regular legitimate business. The use of private funds had been merely incidental to the regular business.

This case presents a dangerous precedent and tends to deprive all defendants of the benefit of the doubt as to *intent, the only defense left the defendants.*

II. *The Circuit Court of Appeals for the 5th Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in that in effect it has deprived this petitioner of his day in court by deciding the question before it on the basis of a question not presented or argued by either party before it.*

The statement in the petition is here adopted and reference is also made to the brief of the third rea-

son for granting this petition for amplification and discussion of the facts.

LaTulle v. Schofield, 60 S. Ct. 313, 308 U. S. 415, will support this ground as a basis for granting the writ of certiorari.

And see *Benton v. State*, 136 So. 428, 24 Ala. App. 441, stating:

"It would not be due process of law for an appellate court to supply a failure of proof or remedy the cursory manner in which the case was tried below."

III. *The Circuit Court of Appeals has decided an important question of law which has not been and should be settled by this court.*

1. The statute covers:
   a. Schemes "to defraud";
   b. Schemes "for obtaining money or property by means of false or fraudulent pretenses, representations and
   c. Promises.

2. The Circuit Court of Appeals in order to render harmless the trial court's error in allowing evidence of dealings and conversations between five witnesses and R. L. Slaughter out of the presence of petitioner, held that the doing of business after insolvency and failure to disclose insolvency to its creditors, constituted a "false pretense" that the firm's affairs were as they had been in the past.

3. The term "false pretense" has a technical meaning at common law.

a. *Origin and History:*

35 *C.J.S.* 637, Sec. 2, states as follows:

> Because the early common law crimes of cheating was confined to certain types of frauds, several English statutes were enacted to broaden the offense, and out of these statutes arose the crime now commonly known as false pretenses. Some states still recognize the common-law offense of cheating; and a number of jurisdictions have adopted the English statutory modifications or enacted statutes substantially similar.
> * * * In some jurisdictions the statute of 33 Henry VIII, or subsequent English statutes, have been adopted as part of the common law, but in at least one jurisdiction it has been expressly held that, while common-law cheating has been recognized, the statutory modifications thereof have not been adopted. *It has been decided that a federal statute making the common law applicable to criminal offenses includes the statute of 30 George II c 24 and such amendments thereto as were enacted before the American Revolution.* (12)
>
> (12) *U. S.—Biddle v. U. S.*, China, 156 F. 756, 84 C.C.A. 415.

35 *C.J.S.* 642 contains the following statement:

> * * * As appears supra Sec. 2, the subsequent English statute of 30 George II c 24 abolished the need for a visible token, and created the crime that is now commonly known as *obtaining money or property by false pretenses.*

See also:

Chaplin v. U. S.—App. D. C.—168 A.L.R. 828 and Annotation on page 833 on Crime of "false pretenses."

b. *Present U. S. Common Law Meaning:* The adoption of the statute of 30 George II c 24 and previous English statutes as part of our common law, has given a definite meaning to the term "false pretenses" when used in our criminal legislation. The elements of the offense are stated in a general way in 35 *C.J.S.* 644. Sec. 6 as follows:

Sec. 6. Elements of Offenses in General. To constitute the crime of obtaining property by false pretenses, there must be a false representation of a past or existing fact, made by the accused or someone instigated by him with knowledge of its falsity, and intended and adapted to deceive, a reliance thereon, an actual defrauding, and an obtaining of something of value without compensation.

The false pretense must have some affirmative act, word, symbol or token intended to deceive, *but a mere nondisclosure of the truth is not sufficient.*

35 *C.J.S.* 655;
McCorkle v. State, 278 S. W. 965, 170 Art. 105;
Stumpff v. People, 117 P. 135, 51 Colo. 202.

The requirements of "false pretense" are not met by cases wherein insolvents applying for credit and not stating orally or in writing that they are solvent,

do not disclose their insolvency to the prospective lender.

Gavin v. Armistead, 22 S. W. 431, 57 Ark. 574, 38 Am. S. R. 262;
Cochran v. Halsey, 25 Minn. 52.

Nor does a "false pretense" comprise that class of cases wherein a borrower at the time of borrowing has no intent to repay.

Chaplin v. U. S., supra, and A.L.R. Annotation thereon, supra.

However, it is true that the mail fraud statute specifically supplements "false pretenses" by adding "promises," and the very fact that this word is added indicates the statutory intention that "false pretense" should have its common law meaning which limits it to past or existing facts.

It is true that there are loose statements made that "false pretense" may be by "implication," and in this connection we have found two federal cases, to-wit:

Harrison v. U. S., 200 F. 662 (C.C.A.6);
Stunz v. U. S. (C.C.A. 8), 27 F. (2d) 575.

However, in both cases affirmative false statements were made by the defendants.

The *Harrison* case reversed the trial court in favor of defendant, and the *Stunz* case was based on express statements through the mail that defendant's medical preparation would restore the sexual vigor

of men of 60, 70, and 80 years of age to that of a 30-year old man.

The case at bar is distinguishable from cases involving obtaining money for shares in a *corporation, stock company, or investment trust.* In those cases the officers or managers of the company are charged by law to act for the members or stockholders and owe them an affirmative duty not to misuse the funds collected without specific consent of the share or stockholders. In such cases there is an affirmative act of obtaining the stockholders' money and of channeling it into purposes which are in effect a conversion of such moneys to the use of the defendants and in violation of the purposes for which the money was entrusted to defendants. This constitutes a "fraud"; 37 *C.J.S.* 233 and cases there cited; and use of the mails to further its execution violates Sec. 215 of the Criminal Code. In channeling the funds to the defendants' own purposes it is not necessary that an express representation be made; the act of diverting such funds is the fraud, the execution of which (and of the scheme involved) may not be through use of the mail.

The present case is one wherein the firm is a general partnership whose primary business is the collection of payments due on mortgage-secured notes belonging to other parties and for which the firm charged 1% per annum of the principal.

The firm only incidentally borrowed money from individuals at 5% or 6% to use to buy mortgage-secured notes and resell them, retaining the collection thereof. When the firm went into bankruptcy it was these unsecured creditors who suffered most.

Brown Bros. owed them no duty to invest their money in anything, or to account for its use in any way.

The relationship was of debtor and creditor.

The Circuit Court of Appeals in its opinion in the instant case in effect holds that where the creditor-debtor relation exists and the debtor is insolvent, there is an affirmative duty to disclose such insolvency; that failure by the debtor to do so renders him guilty of devising *a scheme to obtain money by "false or fraudulent pretenses," thus construing a "false or fraudulent pretense" to be mere inaction (failure to disclose insolvency).*

37 *C.J.S.* 249;
Sankey v. McElevey, 104 Pa. 265, 49 Am. R. 376;

And see:

Davis v. Masonic Protective Asso., 162 P. 516, 94 Wash. 406;
Miles v. Pike Mining Co., 102 N. W. 555, 124 Wis. 278;
Pybus v. Grassi, 59 N. E. (2d) 289, 317 Mass. 716;
James Mills Orchard Corp. v. Frank,—N.Y.S. 473, 137 Misc. 307;
Stewart v. Wyoming Cattle Ranche Co., Neb., 9 S. Ct. 101, 128 U. S. 383, 32 L. Ed. 439.

The Circuit Court of Appeals states in its opinion in this case:

"It is well understood and embodied in many criminal statutes, that for bank officials to receive de-

posits after knowledge of the bank's insolvency is a rank fraud."

On the other hand, this Court has held that under laws applicable to banks organized and operating under the laws of the United States, in the absence of Federal Statute making such action criminal, an officer or agent of a national bank is not criminally liable under a state statute for receiving deposits after insolvency, and further, that there was no such federal statute.

State v. Easton, 23 S. Ct. 288, 188 U. S. 220, 47 L. Ed. 452.

In *McDonald v. Chemical National Bank*, 174 U. S. 610, this Court said:

"It is a matter of common knowledge that banks and other corporations continue in many instances to do their regular and ordinary business for long periods though in a condition of actual insolvency as disclosed by subsequent events. Payments made in the due course of business by a bank which is actually insolvent do not constitute invalid preferences if they were not made in contemplation of insolvency of with a view to prefer one creditor over another."

Obviously the Circuit Court of Appeals is confused with a constructive fraud (in which no criminal intent is essential) and an actual fraud, where an actual intent is necessary; the former not being contemplated by the mail fraud statute—

Or are the officers of national banks subject to

prosecution under the mail fraud statute if, after insolvency, they accept deposits?

See *Pritchard v. Myers*—Md.—197 Atl. 620, 116 A.L.R. 775.

As applied to the case at bar, there is evidence of statements of assurance made by R. L. Slaughter to some of the five witnesses who testified to have loaned money on open account; these statements may constitute "representations" or "promises" to pay interest and repay the money; but they are not admissible as against petitioner unless the whole business was a scheme to defraud or to "obtain money by false pretenses"; the Circuit Court of Appeals impliedly admits that on the basis of the evidence as herein previously set out, including evidence of assertions by R. L. Slaughter made to the five out of the 73 unsecured creditors, and the absence of evidence that any of the remaining 68 unsecured creditors placed money in the firm during insolvency, *it could not find the firm to be a scheme to defraud so as to charge petitioner as a conscious promoter merely by his being a partner in the firm*, particularly when the undisputed evidence of petitioner's actions so clearly show him putting in his own money in the firm and advising others, who offered to loan the firm money, to invest their money elsewhere (thus negating the "purpose of obtaining money or property"). *It therefore bases its affirmation of conviction on the proposition that continuing to do business* (servicing over a million dollars of secured loans annually on which there was no loss) *during insolvency of the firm* (not of the members) *and failure by petitioner to disclose the firm's insolvency to the creditors was*

a "false pretense," justifying the conviction of petitioner without considering the eivednce as to statements between R. L. Slaughter and the five creditor-witnesses.

It is therefore respectfully but earnestly submitted that the opinion of the Circuit Court of Appeals in this case has in effect held the law to be that failure to disclose the insolvency of a firm to its creditors and failure to close down the business after insolvency is a "false pretense" under Section 215 of the Criminal Code; that such "false pretense" is in itself sufficient to support conviction where the firm continues to use the mails in the same manner as before insolvency, because of the alleged resulting trust of civil law which, according to the Circuit Court of Appeals, makes the debtor his creditor's trustee.

The Circuit Court of Appeals acknowledges in effect that it cannot convict Mr. Zimmermann of devising a scheme to defraud without reliance on the testimony of the five witnesses; although a scheme to defraud does not require affirmative acts.

Therefore it holds that nevertheless, Zimmermann was guilty of devising a scheme for obtaininy money by "false pretenses" by failure to disclose insolvency or liquidate the company, predicating this on a duty owed in civil cases by a person holding funds under a constructive trust imposed by facts constituting a constructive fraud. But, it is submitted that to constitute a false pretense an *affirmative act* deviating from the established routine and course of conduct of the firm is essential.

A distinguishing feature between a fraud and a "false pretense" is that the latter requires an

affirmative act, word, or token, while the former does not.

Finally, the Court's attention is drawn to the fact that as an *actual intent* to obtain money is also an element of the common law crime of "false pretense," such crime may not be predicated in so far as the element of intent is concerned, upon facts that might create a constructive fraud—as was attempted to be done in the opinion of the Circuit Court of Appeals.

In conclusion, and by way of summary, we believe this Honorable Court will see that in its opinion the Circuit Court of Appeals has construed the term "false pretense" so as to permit conviction of a person who has no criminal intent, and that for this purpose has in effect held that such "false pretense" may be predicated on a "constructive" trust that arises by virtue of a constructive fraud, thus circumventing *Durlan v. U. S.* which requires an actual intent to defraud. This is all apparent when the facts of the case are summarized objectively, to-wit:

1. Evidence inadmissible against Zimmermann showed that Slaughter received money from five depositors at time of the firm's insolvency, and his own financial status or that of his estate is never shown.

2. The record does not show Slaughter received money from anyone else during insolvency, though there are 68 other open account creditors.

3. It also shows that the losses were approximately the same as the interest earned by the open account principal during insolvency.

4. There is no evidence from which to draw the conclusion that Zimmermann knew Slaughter was accepting money from these five persons, and he states that after 1940 he didn't know of any new open account loans.

5. The evidence shows Zimmermann refusing to accept money on open loan; recommending other investments to persons who wanted to loan their money to the firm on open account; trying to get Slaughter to liquidate the firm; refraining from withdrawing money from the firm beyond his ability to repay, and continuing to service the income producing servicing of collections without compensation for his time, but not disclosing insolvency nor compelling liquidation.

6. There is no evidence that Mr. Zimmermann made any statement or misrepresentation to anyone.

7. The clerical help kept the books and mailed the semi-annual statements the same as when the firm was solvent.

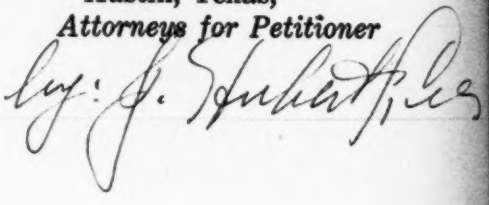
8. For five of these statements and two letters written by Slaughter, Zimmermann is convicted.

It is therefore respectfully submitted that this Honorable Court should grant the writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit so as to:

(1) review the facts and determine that petitioner had no intent to defraud; (2) afford petitioner his day in court to argue and present his defense against the grounds on which the Circuit Court of

Appeals affirmed the conviction, and (3) settle the law in respect to the meaning of "false pretenses for obtaining money or property" as used in Section 215 of the Criminal Code, and to establish that a constructive fraud may not be the basis of a conviction under such statute.

COLEMAN GAY,
HENRY H. BROOKS,
J. HUBERT LEE,
Austin, Texas,
Attorneys for Petitioner



In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 748

GEORGE F. ZIMMERMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Here, as in the Court of Appeals (see R. 372), with two exceptions which we discuss below, the contentions urged by petitioner involve simply the sufficiency of the evidence to support his conviction of using the mails in the execution of a scheme and artifice to defraud. The indictment charged that petitioner, a lawyer (R. 241, 308), and one R. L. Slaughter, who had died before this prosecution was commenced (R. 3, 239), doing business as

Brown Bros., Austin, Texas, devised a scheme and artifice to defraud the customers of the firm and to obtain money and property by means of false and fraudulent pretenses, representations, and promises. Each of the nine counts of the indictment charged a separate use of the mails in carrying out this scheme. (R. 3-8.) Petitioner was tried before the court, a jury having been waived (R. 11, 27). Two of the counts were dismissed on the motion of the United States Attorney (R. 11, 246), and the court found petitioner guilty on each of the remaining counts (R. 11, 360). He was sentenced to two years' imprisonment and fined $1,000 on each count, the imprisonment sentences to run concurrently (R. 19-20).

The fraudulent nature of the scheme and the guilt of petitioner were amply established at the trial. The evidence is summarized in the opinion of the Court of Appeals (R. 371-377; 171 F. 2d 790), and it seems unnecessary to discuss it here, except to add that one of the victims of the scheme testified that, after she learned of the firm's insolvency, she went to petitioner and demanded her money and that the following colloquy ensued (R. 224):

> A. Well, he said the firm had been insolvent since 1938, and I said, "You took my money the first of the year, 1944," which was the check of December 31st.
>
> Q. And what else did he say?

> A. I said, "Mr. Zimmermann, don't you know that is a penitentiary offense?" and he said, "Yes."

As a lawyer, petitioner must have understood the implications of his answer. It is clear, therefore, contrary to his contention, that the evidence showed him to be a conscious participant in the scheme to defraud.

Both courts below having found the evidence sufficient to support petitioner's conviction, we submit that there is no occasion for further review of the evidence by this Court. See *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589-590.

Petitioner also objects here (Pet. 14-15), as he did in the Court of Appeals (see R. 372), to the admission of testimony regarding statements made by Slaughter tending to show that Slaughter was carrying on the alleged scheme to defraud. The objection was that this evidence was not admissible against petitioner unless the latter was a conscious promoter of Slaughter's criminality (R. 76). Although the trial court observed that the objection was probably good as of the time it was made (R. 76), the United States Attorney stated in effect that the evidence would establish that petitioner was a party to the fraudulent scheme (R. 76-77). The trial court agreed to defer ruling on the objection (R. 77), but no further ruling appears to have

been made. As the Court of Appeals held, there can be no question of the admissibility of this evidence in view of the totality of the proof adduced by the Government. Moreover, the statement of petitioner to one of the victims, quoted above, constituted a definite admission that he was a conscious promoter of the scheme to defraud.

Finally, petitioner contends (Pet. 22-30) that the Court of Appeals has in effect deprived him of his day in court by deciding the case on a basis not presented or argued in the trial court. He argues that the case was tried entirely on the theory that Slaughter's statements to five open-account creditors to the effect that their investments were safe with Brown Bros. constituted the false and fraudulent pretenses and representations relied upon by the Government to show a scheme to defraud within the mail fraud statute, whereas the Court of Appeals held that, even if no positive misrepresentations and promises were made, the petitioner's failure to close down the business after the firm became insolvent constituted a "false pretense" within the meaning of the statute (Pet. 23). However, it is clear from the opinion below that the Court of Appeals' affirmance of petitioner's conviction was based upon its holding that the evidence was sufficient to show "that he was consciously aiding and abetting what Slaughter was actively doing" (R. 375). The court's additional observation (R. 375-376) to the effect that the con-

tinuance of the business and concealment of its hopeless insolvency itself constituted a false pretense within the mail fraud statute is amply supported by the evidence and is consistent with the charges of the indictment that petitioner and Slaughter used the mails in furtherance of a scheme to defraud and also to obtain money by false and fraudulent pretenses, representations, and promises.

Petitioner presents no point of substance warranting review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JUNE 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 939711 690